Supreme Court, U.S.
F I L E D
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No. 95-1376

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CHARLES T. ROBINSON, SR.,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICI CURIAE OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AMERICAN ASSOCIATION OF RETIRED PERSONS, AMERICAN CIVIL LIBERTIES UNION, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NOW LEGAL DEFENSE FUND, AND THE WOMEN' S LEGAL DEFENSE FUND IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law was founded in 1963 by leaders of the American bar, at the request of President Kennedy, to involve private attorneys throughout the country in the national effort to assure to all Americans the protections of the civil rights laws. Through the Lawyers' Committee and its local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, D.C., hundreds of lawyers from many of the nation's leading law firms have joined to represent many thousands of victims of discrimination across the country in cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII") and under the other civil rights laws. The Lawyers Committee has a longstanding interest in the scope of coverage and effective enforcement of Title VII and other civil rights laws.

The American Association of Retired Persons (AARP) is a nonprofit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. More than one-third of AARP's thirty-three million members are employed individuals, most of whom are protected by Title VII and the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"). One of AARP's primary objectives is to

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[1] Petitioner and Respondent have consented to the filing of this brief and the parties' letters of consent have been filed with the clerk of this Court.

achieve dignity and equality in the work place through positive attitudes, practices, and polices regarding work and retirement. As part of its advocacy effort, AARP has filed more than 125 *amicus curiae* briefs in the United States Supreme Court, federal appellate and district courts, and state courts regarding the proper interpretation and enforcement of federal and state anti-discrimination laws to insure that the rights of older workers are fully protected.

The National Association for the Advancement of Colored People (NAACP), established in 1909, is the nation's oldest civil rights organization. The fundamental mission of the NAACP includes promoting equality of rights, eradicating caste and race prejudice among the citizens of the United States and securing for African Americans and other minorities increased opportunities for employment.

NOW Legal Defense and Education Fund (NOW LDEF) is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is the elimination of barriers that deny women economic opportunities, including employment discrimination under Title VII of the Civil Rights Act of 1964. In furtherance of that goal, NOW LDEF litigates cases to secure full enforcement of employment discrimination laws, including *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486

(M.D. Fla. 1991), and *Townsend v. Indiana University*, 995 F.2d 691 (7th Cir. 1993).

Founded in 1971, the Women's Legal Defense Fund (WLDF) is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Over its 25-year history, WLDF has placed special emphasis on equal employment opportunity by challenging sex-based discrimination in the courts, and by leading efforts to promote employment policies such as the 1993 Family and Medical Leave Act and the 1978 Pregnancy Discrimination Act.

SUMMARY OF ARGUMENT

The language of Title VII requires an interpretation that covers retaliation against former employees. Section 704(a) requires only that an employment relationship be linked to the retaliatory conduct. The necessary link need not be that of current employment. Section 701(f) does not exclude former employees, although it does contain express exclusions as to certain groups.

The denial of benefits earned during covered employment, but taking effect after the end of such employment, violates the statute, as this Court held in *Hishon v. King & Spalding,* 467 U.S. 69 (1984).

The policy of Title VII precludes an interpretation that will render its anti-retaliation provisions meaningless.

The Fourth Circuit's decision leaves the discriminating employer free to retaliate against any employee who has left its employment for nondiscriminatory reasons, whether voluntary or involuntary. The lack of protection against retaliation will cause current employees not to seek the protections of Title VII, and will cause them to refuse to provide truthful testimony in support of a Title VII claim, since doing so could result in, among other things, loss of post-employment benefits and the inability to obtain a decent job in the future. Leaving former employees without recourse against retaliation would profoundly frustrate the goals of Title VII.

ARGUMENT

Seven Circuits have held that former employees are covered by the anti-retaliation provisions of Title VII and parallel statutes.[2] The Fourth Circuit, in departing from the

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[2] The Second, Third, Fifth, Sixth, Ninth, Tenth, Eleventh, and District of Columbia Circuits have all held that former employees have a cause of action against employers who retaliate under Title VII and statutes with nearly identical provisions. The only two circuits which have reached the opposite result are the Fourth Circuit and the Seventh Circuit.

In *Reed v. Shepard*, 939 F.2d 484 (7th Cir. 1991), the Seventh Circuit declined, without explanation, to follow other circuits in allowing former employees to pursue claims under Title VII's anti-retaliation section. In its one-paragraph discussion of the issue the court stated: "[T]he alleged retaliatory activities took place *after* the termination of Reed's employment and was therefore not an adverse employment action. Under § 2000e-3(a), it is an employee's discharge or other employment impairment that evidences actionable retaliation, and *not* events subsequent to and unrelated to his

result reached by other Circuits, purported to base its decision on the text of the statute, but without considering most of the relevant sections of the statute. We discuss the relevant sections of the statute first and then turn to the Fourth Circuit's analysis.

I. BOTH THE LANGUAGE OF SECTION 704 AND THIS COURT'S INTERPRETATIONS OF THE ACT PROHIBIT DISCRIMINATORY CONDUCT ARISING FROM THE EXISTENCE OF AN EMPLOYMENT RELATIONSHIP, WHETHER THE CONDUCT OCCURS DURING OR FOLLOWING EMPLOYMENT.

A. Former Employees Have the Nexus of an Employment Relationship, Which is All That is Required to Obtain the Protections of §704(a).

A broad interpretation of §704(a), the anti-retaliation section of Title VII, is required by the language of the statute. Section 704(a) states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . because he has opposed any practice

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employment." 939 F. 2d at 492-493 (emphasis in original). Because nothing in the language of the statute provides a basis for such an interpretation and the court did not see fit to explain its conclusion, *Reed* provides little support to the position taken by the Fourth Circuit.

> made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. §2000e-3(a).

The language of §704(a) clearly provides protections from retaliation where there is the nexus of an employment relationship between the person seeking protection and the retaliating employer. However, it is clear from the text of the section that the employment relationship which creates an obligation under §704(a) need not be current employment.

Section 704(a) expressly includes within its protection those individuals adversely affected by an employer's conduct even in the absence of a current employment relationship. Specifically, §704(a) encompasses both "employees" and "applicants for employment." Applicants for employment, by definition, cannot have a current employment relationship with the employer.

By including "applicants for employment," the drafters of §704(a) clearly intended to extend anti-retaliation protection to those not currently employed by the employer. Because §704(a) is unambiguously intended to encompass some persons not currently employed, there is no basis on which to impose a limitation of current employment on those with actual employment relationships. Indeed, the required nexus exists to a greater extent for former employees than

for applicants, because former employees have had an actual employment relationship.

An employer's ability to retaliate against a former employee is no less real than an employer's ability to harm a never-employed applicant. Pension benefits, severance pay, recommendations, and the like, are derived from an employment relationship. Section 704(a) "prohibits discrimination related to or arising out of an employment relationship, whether or not the person discriminated against is an employee at the time of the discriminatory conduct." *Pantchenko v. C.B. Dolge Company, Inc.*, 581 F.2d 1052, 1055 (2d Cir. 1978); *EEOC v. Cosmair, Inc., L'Oreal Hair Care Div.*, 821 F.2d 1085, 1088 (5th Cir. 1987) ("The term 'employee,' however, is interpreted broadly: it includes a former employee as long as the alleged discrimination is related to or arises out of the employment relationship.") (ADEA); *Passer v. American Chemical Society*, 935 F.2d 322, 330 (D.C. Cir. 1991) (ADEA). In the context of retaliation, the ability of an employer to harm a former employee only arises out of, and exists by virtue of, the employment relationship.

B. The Definition Of "Employee" In Section 701(f) Encompasses Former Employees.

The Act's definition of "employee" contains no indication of an intent to exclude former employees. Section 701(f) of Title VII defines "employee" as follows:

> The term "employee" means an individual employed by an employer, except that the term "employee"

> shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

42 U.S.C. §2000e(f), as amended by the Civil Rights Act of 1991, Pub. L. No. 102-166, §109, 105 Stat. 1077.

The essence of the definition of employee is found in the language "an individual employed by an employer." The word "employed" denotes both the past and present tense. As such, it necessarily includes all of those employed by an employer, whether or not the person continues to work for the employer.

This central definition is followed by several exclusions. None of the several exclusions limits the statute's reach to individuals currently employed by an employer. Where the tense of the language used is inclusive and the express exclusions do not limit the tense, there is no textual basis on which to eliminate former employees from §704(a)'s coverage.

In *Robinson v. Shell Oil Company*, 70 F.3d 325, 330 (4th Cir. 1995) the court held: "Because 'former employees' are not included in the statutory language, Title VII's anti-retaliation provision does not protect them." However, the language of the statute is not so narrowly written that it requires an interpretation which excludes former employees. In fact, in order to be as narrow as the Fourth Circuit holds, the term "currently" would have to be inserted before "employed." Despite the Fourth Circuit's refusal to read the section as inclusive of "former employees," its interpretation implicitly requires it to read the section as exclusive to "current employees," a term not used in the section. The coverage of former employees is more consistent with the language used by Congress and, as demonstrated below, with the purposes of Congress as well.

C. The Application of Section 704(a) to Post-employment Unlawful Acts is Consistent With Other Provisions of Title VII.

Termination of employment does not end an employer's obligations under Title VII. *Hishon v. King & Spalding*, 467 U.S. 69, 77 (1984), makes clear that Title VII protects post-employment obligations that arise out of the employment relationship:

> The benefit a plaintiff is denied need not be employment to fall within Title VII's protection; it need only be a term, condition, or privilege of employment. . . . A benefit need not accrue before a person's employment

> is completed to be a term, condition, or privilege of that employment relationship.

Denial of these benefits because of an employee's race, sex, national origin, or religion would result in a violation of Title VII. *Id.* "'There is no ground for affording any less protection [against retaliation] to defendant's former employees than to its present employees' under Title VII." *E.E.O.C. v. J.M. Huber Corp.* 927 F.2d 1322, 1331 (5th Cir. 1991) (quoting *Rutherford v. American Bank of Commerce,* 565 F.2d 1162, 1166 (10th Cir. 1977)).

Under the Fourth Circuit's view, determining whether any particular retaliatory activity is covered or not covered by the Act would depend solely on the fortuity of timing: did the employer wait until the employee who engaged in protected activity was no longer employed? If so, the retaliation would not be a violation and the benefits accrued during employment could be retaliatorily denied without recourse pursuant to Title VII.

Each individual provision of a statute should be interpreted consistently with and in light of other provisions, as well as the statute as a whole. *Phelps Dodge v. NLRB*, 313 U.S. 176, 190 (1940). Other sections of Title VII also indicate that the term "employee" is meant to include former employees. For example, section 706(b) contains a provision which protects the confidentiality of matters discussed during any conciliation efforts between the Commission and the parties: "Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or *employees*, or used

as evidence in a subsequent proceeding without the written consent of the persons concerned." 42 U.S.C. §2000e-5(b) (emphasis added). Under the Fourth Circuit's interpretation of the term "employee," the statutory obligation of confidentiality imposed on EEOC employees would evaporate the day they left the EEOC, and former EEOC employees could then publicly expose any and all information regarding an employer gathered during a conciliation.

Similarly, although §703, which describes unlawful employment practices,[3] appears to be written in the present tense and, thus, to prohibit only present or ongoing practices, such an interpretation, like the Fourth Circuit's

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[3] Section 703(a) provides:

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §2000e-2(a).

approach in this case, would be too narrowly literalistic. Section 706(b) permits charges to be filed against an employer who "*has engaged* in an unlawful employment practice" and §706(g)(1) expressly provides a remedy for practices "the respondent *has intentionally engaged in* or is intentionally engaging in . . . ." (emphasis added) Sections 706(b) and -(g)(1), therefore, reveal that, despite the apparent present tense of §703(a), that section creates liability for past discriminatory practices and is not limited to present discriminatory practices.

In *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977), this Court rejected a literal reading of §703 that would have immunized the employer from liability for previous discriminatory hiring practices. Recognizing the effect of such a narrow interpretation, this Court found liability for past illegal discrimination even without the continued existence of illegal discrimination. Id. at 342-43. "The company's later changes in its hiring and promotion policies could be of little comfort to the victims of the earlier post-Act discrimination, and could not erase its previous illegal conduct or its obligation to afford relief to those who suffered because of it." Id. at 341-42. The language of §703, despite its use of the present tense, necessarily includes events which occurred in the past.

Following this Court's interpretation in *Teamsters*, the existence of language in the present tense does not require a narrow interpretation limited to current conditions, and cannot be interpreted to exclude past or former conditions normally encompassed by use of the past tense. This logic is applicable to construing §701(f) and the definition of "employee." Even if the term "individual employed" is capable of being viewed as written in the present tense, it should be interpreted to include former employees.

D. The Fourth Circuit's Construction Creates a Strained Result.

Indisputably §704(a) prohibits an employer from retaliating against an applicant who filed an EEOC charge, provided information as a witness, or engaged in other protected activity with respect to a former employer. The irrational result caused by the Fourth Circuit's interpretation of the retaliation provisions of Title VII is apparent from its application to a hypothetical example of retaliation. If John Jones testified truthfully in support of a coworker's sexual harassment claim at company "X" and then left and sought a job at company "Y," company "Y" would clearly violate the law if it refused to hire Jones because of his testimony. Company "Y" would equally clearly violate the law if it refused to hire Jones because of a retaliatory reference from company "X" that company "Y" knew to be retaliatory. The absurdity of the Fourth Circuit's interpretation is made plain by the fact that its reading of §704(a) would immunize company "X" for providing a retaliatory bad reference but

penalize company "Y" for acting on it, when both knew it to be false and retaliatory!

This court has recognized that discrimination under Title VII can take the form of creating a workplace environment that is hostile to a particular race or gender. *Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). The Fourth Circuit's decision would require victims of extreme sexual or racial harassment to remain in their employment, no matter how harmful to the psychological health of the employee, or forfeit the protection of the Act for any subsequent retaliation. This result would be at war with the intent of Congress.

The Court in *Chandler v. Roudebush*, 425 U.S. 840 (1976), rejected such "strained and unnatural" readings and set forth what it described as an "elementary canon of construction:"

> This Court pointed out in *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370, that "the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."

425 U.S. at 848.

II. TO ACHIEVE THE GOALS OF TITLE VII, FORMER EMPLOYEES MUST BE PROTECTED UNDER SECTION 704(a).

A statute must be interpreted so as to give effect to its purpose. *Bob Jones University v. United States*, 461 U.S. 574, 586 (1983). The purpose of Title VII has been clearly stated by this Court:

> The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973). The purpose of Title VII can only be achieved by an application of its retaliation provision to former employees.

This Court's decision interpreting provisions of the National Labor Relations Act ("NLRA") consistent with its broad purposes provides guidance. In *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 182 (1940), this Court considered the NLRA's terms in light of its goals:

> Its ultimate concern, as well as the source of its power, was 'to eliminate the causes of certain substantial obstructions to the free flow of commerce.' This vital national

> purpose was to be accomplished 'by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association.'

To accomplish the goals of the NLRA, this Court interpreted the term "employee" as defined in the Act in a manner different then a literal reading of the language. At the time of the *Phelps Dodge* decision, the NLRA defined "employee" in relevant part:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment.

313 U.S. at 190. A narrowly literal reading of this provision would be that former employees who have obtained regular and substantially equivalent employment are not "employees" within the meaning of the NLRA. In *Phelps Dodge*, however, two men who had been denied employment because of their union affiliation were held entitled to relief as "employees" notwithstanding their having obtained the nominally disqualifying "regular and substantially equivalent employment."

Noting that the Board "acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining," 313 U.S. at 193, the Court found that denying the Board "power to neutralize discrimination merely because workers have obtained compensatory employment would confine the 'policies of this Act' to the correction of private injuries." 313 U.S. at 192-93. "To limit the significance of discrimination merely to questions of monetary loss to workers would thwart the central purpose of the Act." *Id.*

This case presents a much easier question then *Phelps Dodge*. Inclusion of "former employees" within §704(a) is entirely consistent with the language of the Act. In any event, *Phelps Dodge* makes it abundantly clear that any ambiguity in language must be resolved in favor of an interpretation that fully serves the purposes of the Act. The Fourth Circuit's interpretation of the statute would thwart the central remedial purpose of Title VII and eviscerate the protection of §704(a).

The importance of providing protection against retaliation is made clear by this Court's holding that even the right to file a lawsuit may be enjoined if it is retaliatory and lacks a reasonable basis. In *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), this Court considered the rights of an employer to file a lawsuit against an employee allegedly in retaliation for actions protected under the NLRA. A waitress who believed her termination was based on her efforts to organize a union filed unfair labor practice charges with the Board. After filing the charges, she and

three co-waitresses picketed the restaurant. The restaurant manager confronted the picketers and threatened to "get even" with them. Five days after the picketing, the owner-employers filed suit against the picketers alleging, among other claims, that defendants had, "engaged in mass picketing, harassed customers, blocked public ingress to and egress from the restaurant." 461 U.S. at 734. This Court held that the Board may lawfully order an employer to cease and desist from the maintenance of a baseless suit motivated by retaliation. *Id.*

In reaching its holding, the Court emphasized the potential for coercive practices by an employer.

> A lawsuit no doubt may be used by an employer as a powerful instrument of coercion or retaliation. As the Board has observed, by suing an employee who files charges with the Board or engages in other protected activities, an employer can place its employees on notice that anyone who engages in such conduct is subjecting himself to the possibility of a burdensome lawsuit. Regardless of how unmeritorious the employer's suit is, the employee will most likely have to retain counsel and incur substantial legal expenses to defend against it.

Bill Johnson's, 461 U.S. at 740-41.

As this Court has emphasized on more than one occasion, "the private litigant not only redresses his own

injury but also vindicates the important congressional policy against discriminatory employment practices." *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 45 (1974); *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. ___, 130 L.Ed 2d 852, 861 (1995); *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 364 (1977). Retaliation against those who exercise their rights under a statute, or who assist others in seeking to protect their rights, debilitates the effective enforcement of a statute. *Mitchell v. DeMario Jewelry*, 361 U.S. 288, 292 (1960) (effective enforcement could only be achieved if employees felt free to approach officials with their grievances) (FLSA); *Bailey v. USX Corp.*, 850 F.2d 1506, 1509 (11th Cir. 1988) (interpretation excluding former employees would "undercut the obvious remedial purposes of Title VII"). A narrowing of these vital rights creates "loopholes" in the protections against retaliation. The gaping hole created by the Fourth Circuit's holding will render Title VII's anti-retaliation provision meaningless.

In this country, employment is not a lifetime proposition. Bad or untruthful references may preclude employees from obtaining the jobs for which they have the most training and experience. Indeed, the Fourth Circuit itself has recognized the importance of post-employment references. In *Wirtz v. B.A.C. Steel Products, Inc.*, 312 F.2d 14, 16 (4th Cir. 1962), an FLSA case, the court stated: "The average employee involved in this type of action is keenly aware of his dependence upon his employer's good will, not only to hold his job but also for the necessary job references essential to employment elsewhere." *See also Rutherford v. American Bank of Commerce*, 565 F.2d 1162

(10th Cir. 1977) (former employer refused to provide reference without including fact that plaintiff had filed a sex discrimination charge); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir. 1990), *cert. den.*, 498 U.S. 943 (1990) (employee blacklisted after filing EEOC charge). In fact, harmful post-employment conduct by an employer can far exceed a negative reference. *Berry v. Stevinson Chevrolet*, 74 F.2d 980 (10th Cir. 1996) (employer retaliated against a former employee who had filed an EEOC charge by filing false criminal charges against him.) Creating a safe harbor for retaliation will increase fears exponentially because all employees will know there will be a point at which employers can retaliate against them with impunity.

Civil rights organizations such as *amici* well know that without the strong guarantee against retaliation, it will become more difficult for persons with meritorious claims to be able to obtain the truthful testimony of present and former coworkers in order to prove the merits of their claims. The effects of retaliatory conduct do not stop with the person targeted, but work to chill current employees from pursuing statutory protections. "[F]ear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions." *Mitchell v. DeMario Jewelry*, 361 U.S. 288, 292 (1960).

In a statute which relies "on information and complaints received from employees seeking to vindicate rights claimed to have been denied . . . effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." *Mitchell v. DeMario Jewelry*, 361 U.S. at 292. The decision of the

Fourth Circuit effectively forecloses that possibility. Faced with knowledge of prior retaliatory acts against former employees, potential lack of recourse in the event of retaliation, and the denial of benefits necessary for obtaining a new job, all but the most fearless employee would be hesitant to testify about even the most blatant Title VII violation.

This Court, in *McKennon v. Nashville Banner,* 513 U.S. at ___, 130 L. Ed 2d at 864, stated:

> The concern that employers might as a routine matter undertake extensive discovery into an employee's background or performance on the job to resist claims under the Act is not an insubstantial one . . . .

This case presents a far greater danger. Unlike the situation in *McKennon*, where employees who are subjected to abusive discovery can seek the protection of the court, *Robinson* provides former employees no such avenue of redress. The employer is welcome to retaliate with impunity against its former employees. This retaliatory action will be felt and witnessed not only by the targeted employee but also by her former coworkers and colleagues still at work for the employer. Without the assurance that there is recourse against a retaliating employer, both current and former employees may decide that complaints are best left unstated and the truth best left untold. In short, affirmance of the decision below will greatly weaken the vital enforcement component of Title VII. Accordingly, *amici* respectfully

request that the Court reverse the holding of the Fourth Circuit and remand the cause for trial.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Dated: June 21, 1996

Respectfully submitted,

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